Editor's note: Appealed -- aff'd, Civ.No. 85-0152-HB (D.NM.) aff'd, No. 87-1573 (10th Cir. Oct. 21, 1988)

HOMER SMELSER
v.
BUREAU OF LAND MANAGEMENT

IBLA 83-227 Decided August 5, 1983

Appeal from decision of Administrative Law Judge Robert W. Mesch dismissing appeal of rejection of grazing application. NM 01-82-1.

Affirmed as modified.

1. Regulations: Applicability--Regulations: Force and Effect as Law

   A regulation is effective and binding only until amended or repealed.

2. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Apportionment of Federal Range

   An application for exclusive grazing privileges in a long-established community grazing allotment is properly rejected under 43 CFR 4130.6(b) as inconsistent with the cooperative purposes and existing operations of a community allotment with numerous other long-time permittees.

APPEARANCES: Philip B. Davis, Esq., Albuquerque, New Mexico, for appellant; John H. Harrington, Esq., Office of the Field Solicitor, Department of the Interior, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Homer Smelser has appealed the decision of Administrative Law Judge Robert W. Mesch, dated November 2, 1982, dismissing his appeal of the rejection of his application for exclusive grazing privileges on portions of the Chiuilla and Shroyer Community Grazing Allotments within the Rio Puerco Resource Area near Cuba, New Mexico. Judge Mesch made separate rulings relative to grazing permits for the public domain lands and the land utilization (LU) lands covered by the application. By order dated March 5, 1983, upon motion of the appellant that was concurred in by the Bureau of Land Management (BLM), the Board dismissed this appeal to the extent that it involved public domain lands.

The Chiuilla and Shroyer Community Allotments are within the San Isidro Grazing District. The majority of the lands in the Chiuilla allotment and that portion of the Shroyer allotment at issue are LU lands acquired by the Department of Agriculture during the 1940's pursuant to section 32(a) of the bankhead-Jones Farm Tenant Act of 1937, 7 U.S.C. § 1011(a) (1958). During Agriculture's management of these lands, the Soil Conservation Service, and later the Forest Service, issued grazing permits for the lands to local livestock operators.

By Exec. Order No. 10,787, 23 FR 8717 (Nov. 8, 1958), jurisdiction over the LU lands at issue was transferred from Agriculture to the Department of the Interior. The order stated:

> Subject to valid existing rights, jurisdiction over the lands, to the extent indicated in the following-described areas acquired or in the process of acquisition by the Secretary of Agriculture under the provisions of section 32 of the Bankhead-Jones Farm Tenant Act (7 U.S.C. § 1011), or transferred to the Secretary of Agriculture for use, administration, and disposition in accordance with the provisions of Title III of that act, * * * is hereby transferred from the Department of Agriculture to the Department of the Interior for use, administration, or exchange under the applicable provisions of the Taylor Grazing Act * * * or under the general land-management authority of the Secretary of the Interior as the Secretary shall determine, including the authority to grant licenses and easements upon such terms as he may deem reasonable.
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> * * * * * * *
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> New Mexico
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> To the extent indicated, the lands administered under Title III of the Bankhead-Jones Farm Tenant Act in connection with the following described Land Utilization projects:
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> * * * * * * *
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> 2. Cuba-Rio Puerco Project (NM LU-22).

By Secretarial Order No. 2843, 24 FR 9488 (Nov. 25, 1959), management authority over the transferred lands was delegated to the Director, BLM, by the Secretary of the Interior. BLM policies and practices with respect to LU lands transferred to Interior began to be developed in 1949 with the first LU land transfer and were eventually incorporated into the BLM Manual in 1965. BLM documents repeatedly recognize that LU lands were to be administered under applicable provisions of the Taylor Grazing Act of 1934, as amended, 43 U.S.C.

§ 315-315o-1 (1976), but BLM would recognize and continue grazing preferences established on the lands by Agriculture. 1/ The BLM Manual provides:

4116 - LU PROJECT LANDS

4116.01 Purpose. The purposes of the Bankhead-Jones Farm Tenant Act with respect to the lands acquired under that act, and the Taylor Grazing Act with respect to the unreserved public domain, are substantially consistent, i.e., to provide for their proper management, orderly use and development as a means of preserving and improving the natural resources, controlling erosion, and reducing floods and flood damage. There is an important difference, however, in the principles that were applied in the allocation of grazing privileges under the two acts. The regulations adopted for the administration of certain LU lands provided for the establishment of a minimum allowable usage of LU land on an economic unit basis and a maximum limit in privileges to be granted to any one individual or applicant. On certain LU projects there was no requirement as to the amount of base property an applicant must possess and; therefore, the extent of such holdings does not necessarily determine the amount of LU land the applicant may be entitled to use. In contrast, the regulations under the Taylor Grazing Act do not provide for minimum and maximum limits as such for the use of the public lands, but the extent of grazing privileges allowable to an applicant is contingent in part upon the forage production of the applicant's base property. The objective of the transfer of jurisdiction over the LU lands from Agriculture to Interior is to place in one agency the responsibility for the administration of the intermingled acquired and public domain lands which generally are very similar in character, thereby attaining increased economy, efficiency of administration and more effective forage utilization.

* * * * * * *

.12 Regulations. The custody and management of the LU lands, first by the Soil Conservation Service and later, in some cases, by the Forest Service, extended over a period of about 20 years. During this period a system of regulation of use and management consistent with the purposes of the Bankhead-Jones Act was developed which was directed toward attaining substantial stability. The Bureau of Land Management, in assuming responsibility over the lands, should continue this administration with a minimum of change and then only as a means of improving uses and management. Those LU lands added to a grazing district are lands additionally available within the purview of 43 CFR 4111.3-2(d)(1). The provisions of 43 CFR 4110, consistent with

1/ See Govt. Exhs. 4-7.

> the policies announced herein, will apply to the administration and management of these lands. The LU lands situated outside of grazing districts will be administered in accordance with consistent provisions of 43 CFR 4120. The existing commitments against the land, i.e., leases, permits, easements, licenses, et cetera, are to be honored and continued in effect. [2/]

Departmental regulation 43 CFR 4111.3-2(d)(1)(1965) issued under authority of the Taylor Grazing Act provided:

> (d) Administration of lands additionally available; preference right for lands restored from withdrawal. (1) Any land within the exterior boundaries of a grazing district made available for administration by the Bureau of Land Management, by a lease under the Pierce Act of June 23, 1938 (52 Stat. 1033; 43 U.S.C. 315M-1-315M-4), by the revocation of a withdrawal, or by the cancellation or relinquishment of a homestead entry or claim, or otherwise, after the grazing privileges in the area embracing the land have been adjudicated, will be administered in accordance with customary use so far as such administration may be practicable and consistent with good range management.

All of the present allottees, including appellant, in the Chiuilla and Shroyer Community Allotments received grazing permits from the Forest Service or trace their grazing privileges to Forest Service permittees (Tr. 83). 3/ Appellant, who first received a grazing permit for the Chiuilla allotment from the Forest Service in 1956, testified that he was not required to offer base property as a condition of permit issuance (Tr. 103). Since acquiring jurisdiction over the LU lands at issue, BLM has administered the land based on customary use in accordance with the above-stated regulation and the BLM Manual. BLM has recognized the grazing privileges of all allottees who were licensed to graze by Agriculture and has not imposed the base property requirement on them (ALJ Decision at 4-5).

Appellant submitted his application for exclusive grazing privileges to BLM on June 18, 1981. Appellant's attorney apparently also wrote to the Interior Field Solicitor on July 31, 1981, detailing appellant's concerns about the distribution of grazing privileges in the allotment. 4/ After

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2/ The cited regulations were originally codified in 43 CFR Parts 160 and 161 and recodified in 1964 into Parts 4110, 4120, and 4130. The latter last appeared in the 1977 issue of 43 CFR. The Department's regulations on range management were completely revised on July 5, 1978. 43 FR 29,067.

3/ There is no specific information in the record of this appeal as to the origin, nature, and duration of the other permits on the Chiuilla and Shroyer allotments. Area Manager Hanks testified that BLM did not now have any documentation of Agriculture's issuance and management of the permits available to it (Tr. 30-31, 84).

4/ Neither appellant's application for exclusive grazing privileges nor the letter to the Field Solicitor was included in the record of this appeal.

considering both the application and letter, the area manager for BLM's Rio Puerco Resource Area issued a proposed decision dated August 10, 1981, rejecting the application. The rejection was based on the fact that the present operators have been grazing on the lands at issue based on historical use following transfer of the lands to the Department of the Interior's jurisdiction, that recognition of those privileges and disputes over qualifications were adjudicated over 20 years ago, and former regulation 43 CFR 4115.2-1(e)(13)(i) (1977) 5/ provided a 3-year limitation on challenges to the grazing privileges of others. The decision concluded that repeal of this regulation could not be construed to allow appellant to require readjudication of other permittees' qualifications which had been recognized for so long because such a finding would not contribute to the stabilization of the livestock industry, the reason for enactment of the Taylor Grazing Act.

Appellant did not protest the proposed decision, allowing it to become final, and thereafter filed a timely notice of appeal on September 24, 1981. Appellant argued that current regulation 43 CFR 4110.1 requires an applicant for grazing use to offer base property and that allocation of grazing rights based on historical use may only be applied to resolve conflicts between otherwise qualified applicants under 43 CFR 4110.5(a). He urged that BLM cannot give present effect to a regulation that has been repealed but that he had timely raised the present issues with BLM in 1960 anyway. Appellant argued further that as an owner of base property and a historical user, his "valid existing rights" cannot be abrogated or diminished by inclusion in a community allotment with other permittees who do not possess valid existing rights to the use of the lands. He contended that issuance of permits to those who do not have contiguous lands results in overgrazing and lack of concern for the condition of the land which is contrary to the purposes of the Taylor Grazing Act.

A hearing was held by Administrative Law Judge Mesch on May 20, 1982, and testimony taken from the appellant and BLM Area Manager, H. E. Hanks. After receiving briefs on the issues in dispute, Judge Mesch issued his decision on November 2, 1982. With respect to the LU lands, Judge Mesch ruled that, prior to passage of FLPMA, BLM properly administered the LU land and that the base property requirements of the Taylor Grazing Act and of the BLM

5/ 43 CFR 4115.2-1(e)(13) (1977) reads:

"(13)(i) No readjudication of any license or permit, including free use license, will be made on the claim of any applicant or intervener with respect to the qualifications of the base property, or as to the livestock numbers or seasons of use of the Federal Range allotment where such qualifications or such allotment has been recognized and license or permit has issued for a period of three consecutive years or more, immediately preceding such claim.

"(ii) The Bureau of Land Management may make adjustments in licenses and permits at any time when necessary to comply with the Federal Range Code for Grazing Districts."

regulations did not apply to such lands. He concluded as well that BLM's regulations presently apply the base property requirement to all land defined as "public land" by FLPMA (see 43 U.S.C. § 1702(e) (1976)) including LU land, but the savings provisions of FLPMA, section 402(h), 43 U.S.C. § 1752(h) (1976), and section 701(a), 43 U.S.C. § 1701 note (1976), prevent any action calculated to deprive the present permittees of their grazing privileges in the two allotments (ALJ Decision at 5-6).

Appellant filed a timely notice of appeal of the decision on December 9, 1982. In his statement of reasons appellant argues that neither savings clause relied on by Judge Mesch applies to the grazing permits on the allotments at issue and therefore Judge Mesch erred in failing to apply the base property requirements of the Taylor Grazing Act to the LU lands in the allotments. Alternatively, appellant suggests that if the savings clauses do apply the Board should find that renewal of the permits must be based on compliance with the Taylor Grazing Act, as amended by FLPMA, and the Department's regulations. Finally, appellant contends that even if FLPMA did not affect BLM's authority to administer LU lands in accordance with customary use, Judge Mesch failed to find that "such administration [is] practicable and consistent with good range management" as required by 43 CFR 4111.3-2(d)(1) (1977).

In response counsel for BLM moves to dismiss the appeal based on appellant's alleged failure to contest Judge Mesch's application of regulation 43 CFR 4115.2-1(e)(13) (1977) to bar appellant's challenge to other permittees on LU lands. However, review of Judge Mesch's decision reveals that he applied the regulation to appellant's right to obtain exclusive grazing use of "the original public land within the Chiuilla allotment," not the LU lands (ALJ Decision at 6). As the appeal as to the public lands has already been dismissed, counsel's motion is denied.

On the merits, counsel for BLM first urges that Judge Mesch correctly found that the base property requirements of the Taylor Grazing Act were not applicable to LU land grazing use upon transfer of jurisdiction to the Department of the Interior or to existing grazing permits upon passage of FLPMA, but objects to his finding that base property requirements apply to LU lands otherwise. He asserts that Congress did not intend to change the meaning of the term "public lands" in statutes enacted prior to FLPMA or modify existing grazing law. Second, he points out that appellant raises the argument as to post-FLPMA renewals or transfers of permits for the first time and urges that appellant's failure to raise this issue at the hearing forecloses him from raising it now. Finally, counsel argues that appellant's testimony as to "good range management" is not relevant to this case because 43 CFR 4111.3-2(d)(1) (1977) no longer exists and section 402(c) of FLPMA, 43 U.S.C. § 1752(c) (1976) prohibits inquiry into past determinations of good range management by granting priority for new permits to existing permittees based on compliance with current regulations.

Throughout the record of this case, it is apparent that considerable confusion exists as to the exact nature of the challenge brought by appellant, whether he is merely contesting the denial of his application or whether he is contesting the permits of the other Chiuilla and Shroyer allottees. On

the record before us this issue seems to result from BLM's application of the repealed 3-year limitation regulation. However, we suspect that the confusion results because BLM's discussion in its decision was dictated as much by the issues raised in appellant's letter to the Field Solicitor as its evaluation of the merits of appellant's application for exclusive grazing privileges.

[1] The decision of the area manager stated that "[t]he deletion of [43 CFR 4115.2-1(e)(13)], providing a 3-year period to contest qualifications of others, cannot be construed to permit a permittee to now require readjudication of qualifications which have been recognized for many years." We agree, but not for the reason argued throughout this case, that is, that the regulation still applies. A regulation is effective and binding only until amended or repealed. Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 683 (9th Cir.), cert. denied, 338 U.S. 860 (1949); 73 C.J.S. Public Administrative Bodies and Procedure § 107 (1951). Cf. United States v. Nixon, 418 U.S. 683, 695-96 (1974) (while regulation remains in effect, executive branch is bound by it). Thus even if this regulation had been effective to bar this type of challenge prior to 1978, it is of no effect today.

In proposing revisions to the grazing regulations in 1976 the Department stated that its purpose was to

> modernize the regulations for administering grazing on the public lands, exclusive of Alaska, to meet present-day needs for more intensive management of these lands. Present regulations were adopted at a time when major objectives were to adjudicate livestock use allowances and to designate grazing allotments. These objectives were essentially accomplished by the mid-1960's. With intensified multiple-use demands being made on the public lands, those regulations have become outdated.

41 FR 31504 (July 28, 1976). Thus, as the emphasis had changed from adjudication to management, no regulation comparable to 43 CFR 4115.2-1(e)(13) (1977) was included in the revision. Instead BLM provided the administrative remedies spelled out in 43 CFR Subpart 4160.

[2] The case before us is an appeal of the rejection of appellant's application for exclusive grazing use and the issue is whether the BLM decision denying the application was correct. Appellant has in effect sought to change his grazing use and therefore we conclude that the applicable regulation is 43 CFR 4130.6(b). The circumstances of this case and the area manager's decision must be examined in light of that regulation. The regulation stated: "(b) Changes in grazing use may be granted at the discretion of the authorized officer if the changes applied for are compatible with existing operations and are consistent with the objectives for the affected allotments." 6/

6/ This regulation was amended effective Oct. 21, 1982, to read "(b) Changes in grazing use may be granted by the authorized officer." 47 FR 41,712 (Sept. 21, 1982).

The affected allotments are community allotments and a community allotment is by definition "a grazing allotment which is assigned to more than one applicant" (Tr. 53). One stated objective of the Chiuilla Community Allotment management plan which appellant signed in 1969 is that the plan is "a cooperative effort of the allottees and [BLM] to establish a continuing grazing management system" for the allotment (Govt. Exh. 10 at 7). Simple logic dictates that a request for exclusive grazing use within the community allotments at issue is incompatible with existing operations and inconsistent with the objectives of the allotments.

Furthermore, there is a long-standing principle of grazing adjudication that a grazing licensee or permittee has no right to any particular area of the Federal range and that a permittee's only reasonable basis for challenging his grazing allotment is to show the allotment to be incapable of satisfying the allottee's authorized grazing demand. W. Dalton LaRue, Sr., 9 IBLA 208 (1973), 7/ and cases cited. If appellant will receive all of the grazing privileges to which he is entitled, he has no right to demand any particular area of use or to complain about the grazing privileges of others. Harold Babcock, A-30301 (June 16, 1965). There is no evidence in the record that appellant has not been granted his full rights.

An adjudication of grazing privileges by BLM reached in the exercise of administrative discretion may be regarded as arbitrary, capricious, or inequitable only where it is not supportable on any rational basis or where it does not substantially comply with the regulations. Lines v. Bureau of Land Management, 66 IBLA 109 (1982); Bureau of Land Management v. Wagon Wheel Ranch, Inc., 62 IBLA 55 (1982). We find that the area manager's decision was reasonable and consistent with 43 CFR 4130.6(b) to the extent that it denied appellant's application because of the long term existence of other permittees within the long-established community allotments. See Fred E. Buckingham, 72 I.D. 274 (1965).

To the extent that appellant's appeal of the rejection of his application rests on a challenge to the validity of those privileges preserved by Exec. Order No. 10,787 in the transfer of the LU lands to the Department of the Interior's management jurisdiction, we will comment generally.

Judge Mesch concluded that:

> Prior to the enactment of FLPMA in 1976, it is clear that the Bureau was properly administering the LU land and that the base property requirements of the regulations and the Taylor Grazing Act did not apply to the land. I say this because (1) the first sentence of the Taylor Grazing Act in referring to "public lands" and "vacant, unappropriated, and unreserved lands from any part of the public domain" establishes that the Act did not apply to the

7/ Aff'd, 538 F.2d 336 (9th Cir.), cert. denied, 429 U.S. 920 (1976).

> LU acquired land; (2) the Executive Order transferring jurisdiction over the land gave the Secretary of the Interior discretionary authority in the management of the land, but conditioned the exercise of that authority on the protection of valid existing rights; and (3) the Secretary, acting through the Bureau, had no alternative other than to follow the Executive Order and Section 4111.3-2(d)(1) of the grazing regulations and administer this land in accordance with past customary use.

(ALJ Decision at 5). We agree.

Appellant argues that no substantial evidence exists to support Judge Mesch's implicit finding that the permits granted by Agriculture were valid permits. He reaches this conclusion based on the following testimony by Area Manager Hanks in response to the suggestion by appellant's counsel that some of the Agriculture permits might have been invalid.

> Again, it appears to me that when Agriculture passed it to Interior and Interior took it, they were taking the fact that the individuals involved, and we are talking about hundreds of them, not just the ones on the Chiuilla Allotment, had valid grazing privileges.
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> Q And yet there is just no documentation to that effect, to your knowledge?
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> A To my knowledge, it doesn't mean that there isn't any, we could spend quite a bit of time going through the archives documenting some of that, or attempting to verify it.

(Tr. 33). What is significant in this appeal, however, is that appellant has presented no evidence establishing or even suggesting that the Agriculture permits were invalid. In an adjudication of grazing privileges, the burden is on the objecting party to show by substantial evidence that the decision appealed is improper or unreasonable. Lines v. Bureau of Land Management, supra; Bureau of Land Management v. Wagon Wheel Ranch, supra. Furthermore, examination of the BLM Manual release on LU lands reveals an awareness on the part of BLM of Agriculture's "system of regulation of use and management consistent with the purposes of the Bankhead-Jones Act." BLM Manual 4116.12 (Govt. Exh. 8). Examination of other materials in the record suggests close coordination between the two agencies including the transfer of relevant files. See Govt. Exh. 4. Over 25 years have passed since Agriculture issued its permits. At this late date, and particularly in absence of any evidence to the contrary, we must invoke the oft-stated presumption of regularity which supports the official acts of public officers in the proper discharge of their duties (see Donald E. Jordan, 35 IBLA 290 (1978)) and consider the permits as properly issued by Agriculture and properly recognized by Interior under the terms and conditions of Exec. Order No. 10,787.

As to the impact of the passage of FLPMA on existing LU lands permits in the Chiuilla and Shroyer allotments, we find the following. Section 701(a)

of FLPMA, 43 U.S.C. § 1701 note (1976), protected any valid permit existing on the date of approval of FLPMA. Thus valid grazing permits for LU Lands existing on October 21, 1976, were preserved.

We decline to address the issue of permits renewed after passage of FLPMA as this appeal does not involve a permit renewal, and appellant is foreclosed from challenging any post-FLPMA renewals which have already occurred when he did not protest or appeal when the renewal decisions were issued. 43 CFR 4.470(b). See Phil J. Hillberry, 24 IBLA 283 (1976). The 1977 revisions to the grazing regulations failed to address the status of LU land permittees. We suggest that BLM give some consideration to the matter in view of the many such existing permits.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Mesch is affirmed as modified.

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Will A. Irwin
Administrative Judge

I concur:

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Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While I agree with the majority rationale for disposing of this instant appeal, I wish to address the problem which this case highlights. The present difficulty arises solely because of an unfortunate misreading of section 103(e) of FLPMA when BLM was drafting the 1978 amendments to the grazing regulations. Section 103(e) defines "public lands" as any land administered by BLM "without regard to how the United States acquired ownership." This, in and of itself, would not be critical since the preface to the definitions expressly states: "Without altering in any way the meaning of the following terms as used in any other statute, whether or not such statute is referred to in, or amended by, this Act." The Taylor Grazing Act, Act of June 28, 1934, 48 Stat. 1269, as amended, 43 U.S.C. § 315 (1976), applied only to public domain land. Thus, absent an express amendment of the Taylor Grazing Act, the passage of FLPMA did not make the Taylor Grazing Act applicable to lands acquired under the provisions of section 32(a) of the Bankhead-Jones Farm Tenant Act, Act of July 22, 1937, 50 Stat. 525, U.S.C. § 1011(a) (1958), repealed by section 102(b), Act of September 27, 1962, 76 Stat. 607, since these lands had, and will continue to have, acquired land status, for purposes of the Taylor Grazing Act. See Junior L. Dennis, 61 IBLA 8 (1981).

In drafting the new regulations, however, BLM personnel proceeded to use the FLPMA definition of public lands. Thus, 43 CFR 4100.0-5 defines public lands as "any land and interest in land outside of Alaska owned by the United States and administered by the Bureau of Land Management, except lands located on the Outer Continental Shelf and land held for the benefit of Indians." (Emphasis supplied.) When this new definition is conjoined with the mandatory requirement that "to qualify for grazing use on the public lands an applicant * * * must own or control land or water base property" (43 CFR 4110.1 (emphasis added)), it seems clear to me that differing treatment of LU land from that accorded public domain land under the Taylor Grazing Act now runs afoul of the regulation. While the majority does not address this question, properly noting that this case does not involve an appeal from a decision issuing a lease to an individual unqualified to hold it, unless the regulations are promptly amended, major changes will ensue which will have drastic impacts upon range users who lack base property, but who have, in the past, been assured that they would be able to continue to use Federal land for grazing. I would suggest that, unless this is the intended result, the appropriate officials should immediately address this problem.

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James L. Burski
Administrative Judge